SUPREME COURT OF YUKON

Citation: *Duncan (Litigation Guardian of) v Yukon (Government of)*, 2022 YKSC 32

Date: 20220630
S.C. No. 20-AP006
Registry: Whitehorse

BETWEEN:

RORY DUNCAN BY HIS LITIGATION GUARDIAN MEGAN WATERMAN

PETITIONER

AND

YUKON GOVERNMENT (DEPARTMENT OF EDUCATION)

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the Petitioner	Mark Wallace
Counsel for the Respondent	I.H. Fraser and Amy Porteous
Counsel for the Yukon Human Rights Commission	Vida Nelson

REASONS FOR DECISION

Introduction

[1] This is an application by the Yukon Human Rights Commission ("YHRC") for an order to be added as a respondent in this judicial review. Their main reason for requesting party status is to have a right of appeal. The scope of their participation at the forthcoming judicial review hearing was determined at an earlier case management

conference. It is limited to submissions on the standard of review, jurisdiction, and explaining the record.

[2] The two parties take no position in this application.

Background

[3] The petitioner is a young man who was diagnosed with a hearing impairment at a young age. In August 2019 he complained (through his family members) to the YHRC about the failure of the Government of Yukon Departments of Education, and Health and Social Services to accommodate him appropriately, alleging discrimination on the basis of physical disability. Some of the allegations date to 2002. The YHRC denied parts of his complaint because they were not considered to be a continuing contravention and therefore were outside of the 18-month time limit set out in ss. 20(2) of the *Human Rights Act*, RSY 2002, c 116 (the "*Act*"). Other parts of the petitioner's complaint were accepted for adjudication by the YHRC; they are in abeyance currently for reasons unrelated to this application.

[4] The remedy sought in the judicial review is an order of *certiorari* to quash the decision, a finding that the complaint was in fact a continuing contravention, and a declaration that the current interpretation of s. 20 of the *Act* cannot effectively meet the goals of human rights legislation and society of eliminating systemic discrimination.

[5] This application requires an interpretation of Rules 54(5) and 15(5) of the *Rules of Court* of the Supreme Court of Yukon ("*Rules of Court*") and the law related to decision-makers as parties to a judicial review.

[6] Rule 54(5) states:

> **Respondents**
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> An applicant shall name as a respondent every person directly affected by the order sought in the application, including the decision-maker in respect of which the application is brought and every person required to be named as a party under the statute pursuant to which the application is brought.

[7] Rule 15(5) states:

> **Removing, adding or substituting party**
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> (5)(a) At any stage of a proceeding, the court on application by any person may
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> (i) order that a party, who is not or has ceased to be a proper or necessary party, cease to be a party,
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> (ii) order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party, and
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> (iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected
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> (A) with any relief claimed in the proceeding, or
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> (B) with the subject matter of the proceeding, which, in the opinion of the court, it would be just and convenient to determine as between the person and that party.
>
> (b) No person shall be added or substituted as a plaintiff or petitioner without the person's consent.

[8] The YHRC says they are entitled to be a party because (a) they are the decision-maker and thus entitled under Rule 54(5) and (b) in any event they are directly affected by the order sought in this petition. More specifically, the YHRC interprets the

declaration sought that the interpretation of s. 20 of the *Act* is improper to meet the goals of the *Act*, to mean that their general jurisdiction to consider complaints is affected. They say the petitioner is disputing the scope or jurisdiction of the YHRC's acceptance or rejection of complaints for investigation under the *Act*. They say they cannot rely on the Yukon government to appeal if they are unhappy with this Court's decision on the judicial review about the interpretation of s. 20. They want to become a party to preserve their right to appeal.

[9] Section 20(2) of the *Act* states:

> A complaint must be made within 18 months of the alleged contravention or of the last instance of an alleged continuing contravention.

[10] Continuing contravention is not defined in the *Act*.

[11] The rest of s. 20 addresses nine specific circumstances which prevent the YHRC from investigating a complaint of contravention of the *Act*, such as if the complaint is beyond the YHRC's jurisdiction, is frivolous or vexatious, or if the complainant abandons the complaint.

[12] The petitioner clarified at the hearing that the s. 20 declaration sought is restricted to the interpretation of "continuing contravention" in s. 20(2) and its interaction with s. 12, entitled "systemic discrimination", in the factual context of this case. Section 12 states simply "[a]ny conduct that results in discrimination is discrimination." The petitioner says in this case there were barriers in place within the education system that were not specifically directed at the petitioner, but that affected him. The petitioner confirms their arguments are restricted to the meaning of continuing contravention in

s. 20(2) and not the whole of s. 20, and specifically the meaning of s. 20(2) as it relates to systemic discrimination.

[13] The YHRC relies on the wording of Rule 54(5) and 15(5) and this Court's interpretation of both Rules in cases where there was a question of the status of the decision-maker in the judicial review. Specifically, the YHRC relies on *Silverfox v Chief Coroner*, 2013 YKCA 11 ("*Silverfox*"), *Liard First Nation v Yukon Government and Selwyn Chihong Mining Ltd*, 2011 YKSC 29 ("*Liard First Nation*"), and *White River First Nation v Yukon (Energy, Mines and Resources)*, 2013 YKSC 10 ("*White River First Nation*"). The YHRC says, based on this jurisprudence, its preference to participate as a party to give them a right to appeal should govern the Court's decision. They say this argument is strengthened because they have agreed to limit the scope of their participation so they will not be making arguments on the merits of the judicial review. YHRC's secondary argument is that they are directly affected by this application for judicial review because of the implications on its jurisdiction to accept or reject complaints if the declaration that the YHRC's interpretation of s. 20 was improper is issued.

Brief Conclusion

[14] For the following reasons, I decline the application of the YHRC.

[15] The Yukon cases have adopted the approach that:

> [60] … the standing of administrative tribunals on reviews of their own decisions must be considered contextually rather than by reference to an *a priori* rule" [*Global Securities Corp. v British Columbia (Executive Director, Securities Commission*), 2006 BCCA 404].

[16] The context of this case is distinguishable from the context of the Yukon cases relied on by the YHRC in its interpretation of Rules 54(5), 15(5), and the meaning of directly affected. Here, the concerns about the effects on YHRC's impartiality if it were to participate as a full party respondent with a right of appeal are real. The YHRC adjudication of certain aspects of the complaint of the petitioner is ongoing and it is possible that the aspects of the complaint they rejected may be returned to them for adjudication. Their appeal of a Court decision considered unfavourable to them and favourable to the petitioner, would make it difficult to view the YHRC as an impartial decision-maker in this case.

Legal principles

[17] The early cases addressing the participation of a decision-maker in a judicial review of its decision, beginning with *Northwestern Utilities Ltd et al v Edmonton*, [1979] 1 SCR 684 ("*Northwestern Utilities*"), were concerned that a tribunal's participation in a review of its own decision would discredit its impartiality if the matter were sent back to it, or if there were future proceedings before it involving similar interests or issues or the same parties. The Supreme Court of Canada also noted that tribunals already had the opportunity to make their reasons and views clear in their original decisions. The result in that case was that the Alberta Public Utilities Board, which had a statutory right to be heard on appeal, was limited to making submissions on jurisdiction and to explain the record.

[18] Later cases have confirmed tribunal participation is a matter to be determined in the court's discretion, in the absence of statutory direction. While the principles set out in *Northwestern Utilities* reflect legitimate fundamental concerns about tribunal

participation in a review of its own decision, they do not serve to create a hard and fast ban on participation by the tribunal. The importance of hearing useful and important information and analysis must be balanced against the necessary respect for the principles of impartiality and finality (*Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at para. 52.)

[19] The Court in *Ontario* (*Children's Lawyer v Ontario (Information and Privacy Commissioner*, 75 OR (3d) 309) ("*Ontario* (*Children's Lawyer*")) (see *Henthorne v British Columbia Ferry Services Inc*, 2011 BCCA 476 at para. 36) outlined guiding factors for the court's exercise of discretion in deciding this issue, including the nature of the problem, the purpose of the legislation, the tribunal's expertise, and the availability of another party to respond to the attacks on the tribunal's decision.

Application of the legal principles to this case

[20] There are factors in each of the decisions relied on by the YHRC that distinguish them from this one.

[21] First, in considering the Court of Appeal of Yukon decision of *Silverfox*, it is helpful to review the original decision of the Supreme Court of Yukon allowing the Chief Coroner to be a party. The judicial review was brought by the family of the deceased to quash the jury's verdict on the basis that the Coroner's investigation and conduct during the inquest demonstrated a reasonable apprehension of bias, breached the duty of fairness and included inadequate jury instructions. This Court found there was procedural unfairness as a result of the jury charge, the manner of presentation of the evidence that prevented the jury from fully considering the evidence, and the failure to give the deceased's family the requisite degree of participation. This Court quashed the

verdict but declined to order a new inquest. The Chief Coroner then appealed this Court's quashing of the verdict to the Court of Appeal of Yukon. The family of the deceased applied to strike the appeal on the basis the Chief Coroner lacked standing because she was not a true party to the judicial review, and it was not appropriate or possible for her to appeal the order critical of her exercise of a judicial function.

[22] The Court of Appeal concluded the Chief Coroner had standing to appeal the order because she was a full respondent in the proceedings in the Supreme Court (para. 14). The Court of Appeal referenced paras. 14 and 16-18 of the Supreme Court decision, in which the Court set out three reasons why the principles in *Northwestern Utilities* did not apply:

a. there would be no one to argue knowledgably against the petitioner's application if the Chief Coroner did not appeal;

b. impartiality of the Chief Coroner was not a concern because of the high unlikelihood that the Chief Coroner would preside over another inquest in the matter; and

c. there were numerous other cases in other jurisdictions where coroners participated as active parties where there were allegations of bias or procedural fairness.

[23] The Court of Appeal accepted those reasons for allowing the Chief Coroner to participate as a party of record at the hearing. A party of record has a right of appeal presumptively. The *Rules of Court* do not differentiate between "true" parties of record and parties whose submissions are limited and thus there were no procedural impediments to the appeal by the Chief Coroner.

[24] There are two ways in which this matter differs from the circumstances in *Silverfox*.

[25] First, there is a significant threat to the impartiality of the YHRC if they appeal the Court's decision. The YHRC argues they are unwilling and unable to rely on the respondent party Yukon government to appeal a decision unfavourable to the YHRC, even though that decision would also be unfavourable to the Yukon government. Assuming the YHRC are the only appellant, they will be required to argue the merits of the appeal. There is unlikely to be an arguable appeal if their grounds and submissions are limited to jurisdiction, explaining the record, and standard of review. Instead, the YHRC will be required to defend their decision.

[26] Parts of the petitioner's complaint are still before the YHRC and have not yet been decided. The YHRC's defence of their decision to deny some of the petitioner's complaints in the context of their ongoing adjudication of other complaints of the petitioner arising from the same circumstances raises the fundamental concern expressed by the Supreme Court of Canada in *Northwestern Utilities*. The tribunal as an appellant will be taking an adversarial position to a party who has an ongoing matter before it arising out of the same factual circumstances. This discredits the impartiality of the YHRC.

[27] Second, in this case the Yukon government is a responding party and will be arguing against the petitioner. The government's interests are in upholding the decision of the YHRC to deny parts of the complaint. They can argue from the YHRC decision, the record and their own knowledge of the issues in the case in support of the YHRC's interpretation of continuing contravention in s. 20(2). The Yukon government will

likewise have an interest in appealing the Court's decision if the result is a quashing of the YHRC decision.

[28] The next case relied on by the YHRC of *Liard First Nation,* involved a recommendation by the Yukon Environmental and Socio-Economic Assessment Board ("YESAB") to the Yukon government to allow an underground mining exploration project to proceed with terms and conditions, and the acceptance of that recommendation by the Yukon government. Liard First Nation brought an application for judicial review against the Yukon government alleging deficiencies in their decision accepting the recommendation of YESAB, as well as deficiencies in the YESAB report. In allowing YESAB to be a full party respondent, this Court relied heavily on the principles set out in its own decision of *Western Copper Corporation v Yukon Water Board*, 2010 YKSC 61 ("*Western Copper*"). Although that case was an appeal and the *Liard First Nation* case was a judicial review, this Court held that the rules for who is served and becomes a respondent are functionally equivalent in both types of cases. This Court in *Liard First Nation* adopted the procedure set out in *Western Copper* that a person not named as a party could indicate its preference for involvement: do nothing and not participate; file an appearance and response and thereby become a party of record with a right of appeal and costs exposure; or apply for intervener status to participate but avoid court costs.

[29] This Court's justification for its decision to allow full party respondent participation in both *Western Copper* and *Liard First Nation* was to improve access to justice by avoiding costly court applications, and to follow the clear direction of the Rules. Although this Court acknowledged the *Northwestern Utilities* warnings, it concluded that the public interest in exploring fully the interpretation of the governing statute and the

role of YESAB outweighed the tribunal impartiality concerns. There was no discussion of the nature of the impartiality concerns, their likelihood of occurring, or the impact, if any, on the credibility of YESAB.

[30] The *Liard First Nation* decision can be distinguished in two ways. In *Liard First Nation*, the Yukon government was the decision-maker, not YESAB. No relief or remedy was sought against YESAB, although the petition set out alleged deficiencies in the YESAB report and recommendation. Here, the YHRC is the decision-maker. If the decision is quashed and upheld on appeal, it will be returned to the YHRC, who will have to adjudicate on it before the same complainant who is also the petitioner. Moreover, as noted, there are parts of the complaint still to be adjudicated. An adversarial position taken on appeal by YHRC against the complainant is not compatible with an ongoing adjudication of other aspects of the complaint by the same complainant, or with the rehearing of the original complaint if it is returned.

[31] Second, while the Court in *Liard First Nation* urged applicants to follow the clear language of Rule 54(5), it has no provision allowing an entity named as a respondent to express a preference about its manner of participation. This is unlike, for example, s.15 of the British Columbia *Judicial Review Procedures Act*, RSBC 1996, Chapter 241, which requires the decision-maker to be served with the petition and provides that decision-maker the right at their option, to be a party to the application.

[32] Third, Rule 54(5) requires a determination of whether the tribunal seeking party status has been directly affected by the order sought in the application. There was no analysis either in *Western Copper* or *Liard First Nation* of the meaning of this phrase, or how it may apply to decision-makers. I will address this further below.

[33] Finally, the case of *White River First Nation* relied on by YHRC did not involve a decision-maker seeking to be a party to the application for judicial review. White River First Nation sought judicial review of the Yukon government's decision that a mining project should proceed. The entity seeking to be added as a party was Kluane First Nation, a first nation with the same traditional territory as White River First Nation and consequently an interest in whether the project proceeded. Concerns about impartiality of the decision-maker did not arise in that case and as a result it is not helpful to the analysis here.

[34] The second argument of YHRC is that even if Rule 54(5) is interpreted in a way that does not allow YHRC's participation as a party for the purpose of the right of appeal, the YHRC is directly affected by the application.

[35] Directly affected has been the subject of very little judicial interpretation. There has been even less consideration of what it means for a decision-maker to be directly affected. Generally, if a third party to the dispute has its legal rights or financial position affected, or is affected by the precise outcome of the matter between the main parties, it will be directly affected (see paras. 37 and 31 in *Kitimat (District) v Alcan Inc*, 2006 BCCA 562).

[36] The petitioner has clarified that its challenge is restricted to s. 20(2) of the *Act* and not the whole of s. 20. The petitioner is challenging YHRC's interpretation of continuing contravention in the factual circumstances of this case, which involves allegations of systemic discrimination over a period of years. In other words, the legal challenge does not extend to YHRC's jurisdiction to accept or reject complaints under s. 20. Instead, this is a fact specific and limited challenge. YHRC's legal rights or

financial position are not affected, and the precise outcome of the dispute between the main parties will only affect how it interpreted s. 20(2) in the factual circumstances here. This is insufficient for it to be considered to be directly affected under Rule 54(5).

[37] Counsel for YHRC did not make oral submissions about Rule 15(5). I accept the intent of that Rule is to ensure all proper parties to a hearing are before the court. Given YHRC's confirmed and agreed-upon participation in this judicial review, and the limited focus of their argument to the right of appeal, an analysis of this Rule is not necessary.

Conclusion

[38] To conclude, YHRC wants to preserve its right to appeal in case this Court disagrees with its interpretation of s. 20(2) in the context of the petitioner's ongoing complaint against the Yukon government. This is the kind of situation the Supreme Court of Canada in *Northwestern Utilities* said should be avoided, because of the compromise to the decision-maker's impartiality requiring them to defend their own decision. This effect on impartiality is concerning in the circumstances that exist here, where YHRC is still adjudicating parts of the same complaint. On any appeal, YHRC, assuming they are the only appellant, will have to make submissions beyond those about jurisdiction, the standard of review and explaining the record. As noted by the Alberta Court of Appeal in *Leon's Furniture Ltd v Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94, the principle in *Northwestern Utilities* "will often be applied with full vigour to administrative tribunals that are exercising adjudicative functions, where two adverse parties are present and participating" (para. 28). This is that situation.

[39] The approach adopted in these reasons is consistent with the more modern flexible practical approach to administrative law (see para. 26 *Leon's Furniture*, quoting from *Ontario (Children's Lawyer)* para. 35). Here the YHRC will participate in the judicial review, but not to the extent of defending or explaining its decision. This limited participation is appropriate as it strikes the balance between providing the Court with helpful information and arguments, and maintaining impartiality. This is important given the adjudicative function of YHRC, and the parts of the complaint before it from the petitioner that remain to be adjudicated. To allow YHRC to appeal a decision of this Court they consider unfavourable to them, in the context of the ongoing complaint adjudication between the same parties, risks discrediting their impartiality.

[40] If the circumstances change and the parts of the complaint that remain to be adjudicated by the YHRC are resolved, or the arguments of the petitioner related to s. 20(2) turn out to be different than articulated, thus changing the analysis of directly affected, then the YHRC may renew this application, based on those changed circumstances.

[41] The application of YHRC is dismissed. There is no costs order.

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DUNCAN C.J.